

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION  
APPLICATION FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY

In the Matter of the Application of	)	
Illinois-American Water Company for	)	
Certificates of Public Convenience and	)	
Necessity to Provide Water and/or	)	Docket No. 03-0362
Sanitary Sewer Service to Parcels in	)	
Cook, DuPage and Will Counties,	)	
Illinois Pursuant to Section 8-406	)	
of the Public Utilities Act.	)	

**RESPONSE BRIEF OF THE CITY OF LOCKPORT**

Background

The Illinois-American Petition for a Certificate of Convenience and Necessity, which is the subject of this proceeding, seeks a Certificate of Convenience and Necessity (a Certificate) for sewer, to serve three areas in the Lockport Facility Planning Area (FPA), referred to as Hiller, Ohla and Cedar Ridge. The City of Lockport intervened, opposing a Certificate for these areas.

Lockport and Illinois-American (or Petitioner) have held a series of settlement meetings agreeing in principal since August 2003 to a "global agreement" which corresponds to a pending Boundary Agreement between Lockport and Homer Glen. Under the global agreement:

- 1) Lockport would be the sole provider of water and sewage treatment, collection, maintenance and administration on the Lockport side of the boundary, and
- 2) Lockport would provide "wholesale" sewage treatment and Illinois-American would provide sewage collection, maintenance and administration on the Homer Glen side.

The parties have exchanged draft agreements. The Lockport draft is consistent with this global approach. The parties have agreed to this division of services for the Hiller, Ohla and Cedar Ridge parcels.

Illinois-American has expressed a concern that the proposed global approach is an improper division of territory and is contrary to public policy, and that it cannot legally enter into such an agreement. This concern was first clearly expressed during a status hearing by conference call on January 23, 2004,

almost six months after the parties reached basic agreement to a global agreement. The ALJ directed the parties to brief the issue during a status on March 11, 2004.

The parties have always proceeded with the understanding that the ICC had ultimate jurisdiction over Illinois-American's petition.

#### Issues Presented

Can Illinois-American enter into an agreement with The City of Lockport consistent with the Lockport/Homer Glen Boundary Agreement which provides that: 1) Subject to requirements for Certificates of Convenience and Necessity, Illinois-American will provide sewage collection, maintenance and administration for additional parcels on the Homer Glen side with Illinois Commerce Commission approval a condition precedent to the addition of any of the new service areas, 2) that Lockport will be the sole provider of sewage treatment in the Lockport FPA, and 3) that Lockport will be the sole provider of sewer and water service on the Lockport side of the FPA.

More specifically, the issue presented is whether Illinois-American may lawfully enter into such an agreement. Lockport and Illinois-American have exchanged drafts of a proposed Wholesale Wastewater Treatment Services Agreement Between the City of Lockport, Will County, Illinois and Illinois-American Water Company. The Wastewater Agreement has been drafted to make an ICC Certificate a condition precedent to the addition of any new Illinois-American service areas. The ICC is intended to retain full jurisdiction with respect to Illinois-American. Other language has been and can be added, addressing any remaining jurisdictional issues and severability. The proposed agreement has been modified to add a "severability" provision and addressing areas in the FPA for which Illinois-American has already been certified for water.

#### Discussion

Lockport's authority to enter into an intergovernmental agreement or the Wastewater Agreement is not at issue. Similarly, it is established that the Illinois Public Utilities Act (the "Act") and the Illinois Commerce Commission do not regulate municipal utilities, e.g. *Island Lake Water Company v. LaSalle*

*Development Corporation*, 143 Ill. App. 3d 310, 493 N.E. 2d 44 (2d Dist. 1986). Lockport is a municipal utility for sewer and water within the city and in some nearby unincorporated areas.

The global Wastewater Agreement is drafted to make an ICC certificate a condition precedent to Illinois-American's addition of any service area on the Homer Glen side. These additional service areas are not currently before the ICC in this proceeding and would be subject to future proceedings for Certificates as they are developed.

1. The Agreement is Supported by Public Policy.

Lockport believes a global agreement may be entered into, legally. There are also sound policy reasons for such an agreement, including considerations of good planning and engineering, including cost-effectiveness.

What the parties refer to a global agreement is essentially an agreement defining future service areas. The Wastewater Agreement corresponds to the Lockport/Homer Glen Boundary Agreement. The two agreements are integrally related.

Illinois-American is performing services that would otherwise be performed by the municipality, Homer Glen, on its side of the boundary.

Lockport and Homer Glen agree that Lockport should provide sewage treatment throughout the Lockport FPA. The global agreement with Illinois-American is intended to mirror the Boundary Agreement. Homer Glen is not equipped to perform the sewer collection, administration and water functions that it expects Illinois-American to perform, or sewage treatment, and Homer Glen supports the global agreement as the mechanism for fulfilling the objectives of the boundary agreement.

The global agreement recognizes Illinois Commerce Commission jurisdiction over Illinois-American including the requirement for a Certificate for the addition of any Illinois-American service area. The ICC should find this approach to be a lawful means for facilitating the Boundary Agreement.

Illinois-American has presented three main arguments: 1) that a public utility may not enter into territorial agreements as against public policy, 2) that the ICC must determine the least cost alternative

each time a service area is added, and 3) that the Act prohibits discrimination, preventing any agreement not to serve any area.

Many of the cases relied on predate the Act, including cases that date to the 1800's. They provide, generally, that statutorily created utilities could not pick and choose their customers or sell all or part of their territory. The Act now establishes procedures for the sale of public utilities and these old cases are not applicable. Second, the ICC will have jurisdiction to consider cost and other factors when determining whether any new parcel should be added to the Illinois-American service area. Third, it is improper to invoke any anti-discrimination provision of the Act when there has been no discrimination. The statutory anti-discrimination provision is also misapplied, as discussed below.

2. Illinois-American's Argument that It Cannot Agree Not to Serve an Area is Counter-intuitive and Not Consistent with Actual Practice.

Illinois-American is asserting that it cannot agree to restrict its ability to serve an area in the future. This is counter-intuitive and contrary to case law and, we believe, actual practice. Illinois-American must initiate any Petition for a Certificate of Convenience and Necessity. The addition of any Illinois-American service area is ultimately subject to the issuance of an ICC Certificate. However, Lockport believes public utilities routinely enter into service agreements.

Lockport has not attempted to document "actual practice" but the case law suggests that service area agreements are commonplace. Service area agreements are also useful and relevant to good planning and engineering.

Illinois-American admits that Illinois-American and Lockport "have reached an agreement" that Lockport will provide sewage treatment and Illinois-American will provide sewage collection for the Ohla, Hiller and Cedar Ridge properties. Petitioner's Brief p. 1.

In *Coles-Moultrie Electric Cooperative v. The City of Sullivan* the court addressed an agreement resolving territorial disputes relating to property in and near Sullivan. 304 Ill. App. 3d 153, 709 N.E. 2d 249 (Ill. App. 4<sup>th</sup> Dist. 1999). The court construed the contract, specifically the "clear and unambiguous" terms

which related to the City of Sullivan's existing service territory. 304 Ill. App. 3d at 157. The court ruled in favor of the City of Sullivan, enforcing the territorial agreement as it defined the City's territory. *Id.* at 161.

*Sullivan* also provides support for territorial agreements outside of the express provisions of the Electric Supplier's Act. The Act provides a limitation on service agreements between "electric suppliers" requiring ICC approval. *Id.* at 166. This limitation did not apply to the City because it was not an "electric supplier." *Id.* *Sullivan* also involved the city's right to serve areas outside of the city prior to annexation. The court found that the Municipal Code had "consistently been interpreted" to mean a city has the right to serve areas outside of the municipality if a major portion of its services were within the municipality. *Id.* at 161-162.

In *Illinois-American Water Company v. City of Peoria*, the court upheld a contract between the city of Peoria and the public utility's predecessor allowing the City to purchase a waterworks. 333 Ill. App. 3d 1098, 774 N.E. 2d 383 (Ill. App. 3d Dist. 2002).

A very recent case, *Village of Orland Hills v. Citizens Utilities and The Village of Tinley Park*, is also instructive. 2004 Ill. App. Lexis 2d (Ill. App. 1<sup>st</sup> 2004). For relevant purposes, the court recognized a territorial or service area agreement. The court construed the agreement, specifically the Water Supply Contract's reference to the "Tinley Park planning area" which was a restricted area in which Citizens "may not provide water service." *Id.* at 4. The court also recognized a franchise ordinance which was "subject to" the rights and powers of the Illinois Commerce Commission in determining whether Citizens was required to serve the area newly annexed to Orland Hills. Finally, the court enforced the Water Supply Contract between Tinley Park and Citizens, including the restriction on Citizen's service areas, which the ICC had approved. However, it is also notable that other aspects of this case are problematic and it may be distinguished. The service area agreement was not integrated with a valid Boundary Agreement and was in fact being used to frustrate a property owner and Orland Hills in their efforts to annex the property to Orland Hills.

In *Town of Stookey v. East St. Louis and Interurban Water Company*, 22 Ill. 2d 115, 174 N.E. 2d 193 (S. Ct 1961), the public utility, Interurban Water Co. had entered a franchise agreement with the City of Belleville to serve the City and areas that were annexed as well as a contract/service area agreement with The Town of Stookey, agreeing not to serve certain areas in Stookey's service area. The case was returned to the appellate court on procedural grounds. Stookey provides support for territorial and franchise agreements. The appellate court held that the contract excluded the areas annexed to Belleville from Stookey's service area and ruled in favor of Belleville and Interurban. *Town of Stookey v. East St. Louis and Interurban Water Co.*, 33 Ill. App. 2d 238 179 N.E. 2d (App. Ct. 4<sup>th</sup> Dist. 1961).

The cases cited by Illinois-American such as *Stookey*, involve the court's interpretation of territorial agreements where they existed. Other cases involving overlapping municipal and public utility jurisdiction are not applicable to the question here.

Other cases appear to have been decided on the merits in proceedings for a Certificate.

### 3. The ICC May Not Assert Jurisdiction Over Lockport Sewage and Water.

In *Island Lake*, the court addressed a private utility's effort to enjoin the construction of a water supply system. Island Lake Water Co. was a public utility that had served the Village of Island Lake for many years. The developer, LaSalle, had an agreement with the Village to furnish a potable water supply system that the Village would purchase, own, operate and maintain. The Village adopted a series of ordinances related to acquiring the system and the issuance of revenue bonds, and forming a municipal utility.

The court dismissed the private utility's action seeking to enjoin the construction of a municipally owned and operated system holding that "the village has taken the necessary action to build and operate a municipally owned utility. The utility being constructed by the developers (the Village) is exempt from

the Public Utility Act pursuant to Section 3-105. Accordingly, the water company may not enjoin its construction under Section 8-406 (b).” *Island Lake*, 143 Ill. App. 3d at 321.<sup>1</sup>

#### 4. Planning for Sewage and Water Is in the Public Interest

The Northeast Illinois Planning Act recognizes the importance of planning for sewage treatment. 70 ILCS Section 1705/21. Sewage planning is implemented through Facility Planning Areas for sewer service. FPAs are required by the Federal Clean Water Act, 33 U.S.C. Section 1251 et seq., and implemented through the Illinois Water Quality Management Plan. Other Illinois water regulations administered by the Illinois Environmental Protection Agency recognize FPA boundaries in connection with the issuance of permits, providing limited exceptions. Pursuant to 35 IAC section 351.502:

##### Section 351.502 Exceptions to Boundaries for Facility Planning Areas

For purposes of issuing permits, other than NPDES permits, the Agency may recognize exceptions to boundaries of facility planning areas without revising the approved WQM Plan in the following circumstances.

- a) When the General Assembly, by legislation, authorizes the extension of sewer service to an area outside the facility planning area established by the Agency pursuant to federal regulations; or
- b) When all of the following conditions are present:
  - 1) The exception will not significantly impact wastewater planning in any facility planning area;
  - 2) A revision would otherwise be necessary because a proposed sewer would cross a facility planning boundary; and
  - 3) The designated facility planning agency, within whose facility planning area the area to be serviced by the sewer lies, has authorized such sewer extension by permit, agreement or other written document. (Emphasis supplied.)

Lockport’s Facility Planning Area includes the areas also known as “Lockport”, “Bonnie Brae” and “Lockport Heights,” and includes the construction and upgrade of three sewage treatment plants along the Illinois River and sewer trunk mains and other infrastructure to serve the FPA, pursuant to Lockport’s

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<sup>1</sup>Illinois-American previously obtained a certificate for water for some limited areas on the Lockport side of the boundary. These areas are not currently being served by Illinois-American. They are excepted from the Wastewater Agreement. Lockport will include these areas in its municipal service areas for sewage and water when they are annexed, providing service as a municipal utility.

Server Master Plan. Lockport has incurred and committed to major capital expenditures in implementing the Sewer Master Plan and on Lockport's water distribution system.

The ICC will not have jurisdiction over areas that are served by Lockport Municipal Utilities. The Wastewater Service Agreement proposed is consistent with the Boundary Agreement. Good planning and engineering are additional reasons for the proposed Agreement. Services Agreements should be encouraged because they promote good planning and engineering.

Cases also support the desirability of and the need for planning. E.g., *Citizens Utilities Company of Illinois (Formerly Metro) application for a Certificate of Convenience and Necessity*, 1998 Ill. PUC Lexis 557 July 8, 1998. Citizens Utilities (now Illinois-American) was certified to serve areas in Homer Township as a result of Citizen's "regional planning activities" and its "master plan." *Id.* at 5-6. There were also major capital expenditures for the construction of a 4 million gallon standpipe representing "approximately one-third of the ultimate (i.e. in year 2025) additional 12.4 million gallons of storage that it would need to provide," and a 500,000 gallon water tank. *Id.* at 5.

The case also sought a certificate for sewage for School District facilities in The Lockport FPA. Citizens represented that it would provide "collection" and cited precedent for Citizens providing collection with another entity such as the MWRD providing treatment. *Id.* at 9.

#### 5. The Historical Cases Are Not Controlling

Illinois-American relies on several cases involving utilities created by legislation before the Act came into effect. These utilities were prevented from entering into agreements transferring, assigning or "selling" service areas that had been granted by statute. The cases are not applicable. For example, The Peoples Gas-Light and Coke Company which was organized under a special charter in 1855, to manufacture and sell gas in Chicago after 1859 entered into a contract purporting to convey the "west division" of its territory to Chicago Gas and Electric. *Chicago Gas-Light & Coke Co. v. Peoples Gas-Light & Coke Co.* 121 Ill. 530, 13 N.E. 169 (S. Ct. 1887). The court held that the utility which was

organized under a general charter could not enter into such a contract, holding the contract “*ultra vires*.” *Id.* at 176.

Similarly, *People ex rel Pearce v. Commercial Telephone and Telegraph Co.* involved the attempted sale of a telephone company with a legislative grant of authority by municipal franchise. 277 Ill. 265, 115 N.E. 379 (1917). The Public Utility Act was not in force at the time of the purported transfer and there was no evidence that the transfer was authorized by the Public Utilities Commission. *Id.* at 271-272. The Pearce court acknowledged that Section 27 of the Public Utilities Act gave the Public Utilities Commission the right to authorize an assignment or sale. *Id.* at 271.

However the Act was not in force when the transfer occurred and there was no evidence or claim that the Commission had authorized the transfer. *Id.* *South Chicago City Ry. Co. v. Calumet Electric St. Ry. Co.* also predated the Act and was decided on antitrust grounds, 171 Ill. 391, 49 N.E. 576 (1898).

#### 6. Statutory anti-discrimination provisions are not applicable.

Statutory anti-discrimination provisions are not applicable. The statutory prohibition relates to a public utility’s rate setting, and the legislative nature of setting rates. It relates to discrimination in the setting of public utility rates. The Act supercedes common law as far as the setting of rates and unreasonable discrimination is concerned. *Christy Adams v. Northern Illinois Gas Co.*, 2004 Ill. Lexis 379 p. 40 (S. Ct. 2004). Thus, ICC procedures and rulemaking are intended to address discrimination concerns.

#### Conclusion

Illinois-American may enter into an agreement dividing the service areas which are not currently subject to a Certificate, for sewer and water service. The Wastewater Agreement is integrally related to the pending Lockport/Homer Glen Boundary Agreement. The Cities are prepared to enter into the Boundary Agreement in conjunction with the Lockport/Illinois-American Wastewater Agreement.

The Boundary Agreement is a lawful exercise of the municipalities' governmental powers. The ICC should rule that the Wastewater Agreement is also lawful, helping fulfill appropriate governmental purposes.

THE CITY OF LOCKPORT

by \_\_\_\_\_  
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